ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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	)	
Promoting Efficient Use of Spectrum	)	
Through Elimination of Barriers to the	)	WT Docket No. 00-230
Development of Secondary Markets	)	
	)	
	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

The Commission should use this rulemaking to remove all unnecessary regulatory barriers that inhibit the development of robust secondary spectrum markets. In particular, the Commission should remove those outdated and obsolete policies that create unnecessary barriers to interested parties entering into leasing or other excess capacity arrangements.

First and foremost, the Commission should abandon the *Intermountain Microwave* criteria as a means to review whether certain agreements by licensees constitute *de facto* transfers of control. While many licensees are comfortable with outright purchase or management arrangements, many are not and there are a range of other possible relationships that a flexible spectrum use policy would allow. Significantly, licensees that want to retain their rights to spectrum could lease spectrum without fear of adverse regulatory implications. By doing away with the *Intermountain Microwave* decision and affording licensed wireless providers opportunities to open their underused or unused spectrum to potential lessees, the Commission will maximize the potential of valuable spectrum resources and promote the development of secondary market in wireless spectrum.

In addition, the Commission should allow *all* mobile wireless licensees to have the freedom to negotiate secondary market agreements, not just those with "exclusive" spectrum assignments, if the necessary arrangements are acceptable to spectrum users. There is no rational basis for the Commission to impose arbitrary restrictions on secondary market transactions that can be employed by all mobile wireless licensees, across all license categories, including licensees of commercial, noncommercial, and public safety spectrum whether exclusively licensed or not. Assuming the Commission has an adequate initial licensing framework and

interference frequency coordination rules in place, there should be no adverse effect from embracing fully flexible policies.

By permitting all mobile wireless carriers to lease their underused or unused spectrum resources on a secondary market basis, the Commission will promote spectrum efficiency and the public interest. Both private and commercial carriers will have the flexibility to make use of their spectrum resources without having to assign them and ultimately lose control of their licenses. This alternative is particularly attractive to those carriers, including public safety licensees, that have stored spectrum resources that they are unable or unwilling to sell.

Requiring the licensee to retain the ultimate responsibility for ensuring that the spectrum lessee complies with the Communications Act and the Commission's rules prevents any concern that spectrum lease arrangements will conflict with the regulatory and technical parameters of a license. Further, written contracts that include specific obligations on the lessee to comply with the Commission's rules and policies would address enforcement issues that may arise, and allay any concerns the Commission may have over regulatory compliance.

Finally, in adopting flexible secondary market policies the Commission should recognize its obligation to preserve the expectations of the wireless industry once secondary markets begin to function under the new regime. Relative certainty is vital to business development and the emergence of a vibrant secondary market.

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Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Nextel fully supports action by the Federal Communications Commission ("Commission") to "remove unnecessary regulatory barriers to the development of more robust secondary markets in radio spectrum."[2] Eliminating Commission rules and policies that inhibit the effective functioning of a secondary market for wireless services spectrum will foster additional competition, promote spectrum efficiency and thereby advance the public interest.

I. INTRODUCTION

In the *Notice*, the Commission seeks comment on ways to encourage the operation of secondary spectrum markets. The Commission correctly observes that there may be outmoded policies in commercial mobile radio services ("CMRS") and elsewhere that prevent interested

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[1] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, WT Docket 00-230, FCC 00-402, (rel. November 27, 2000) ("*Notice*").

[2] *Notice* at ¶ 1.

parties from entering into leasing or other excess capacity arrangements that the Commission permits in other radio services.

As a CMRS provider using primarily 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") spectrum, Nextel has had literally years of experience acquiring spectrum via private transactions in the secondary market. These deals run the gamut from management agreements to agreements to acquire existing licenses, as well as to swap channels with, relocate or retune SMR incumbents to gain greater and more efficient access to spectrum. While many deals can and have been struck under current Commission policies, the Commission's policies concerning whether a transaction might be considered a *de facto* transfer of control have inhibited the use of leases, joint ventures and other flexible commercial agreements to bring those needing spectrum and those with excess spectrum capacity together through the secondary marketplace. While buying licenses and executing management agreements suit some situations, there are many situations, where, for a number of reasons, a licensee does not want to sell its license or operate under a management arrangement. Flexible spectrum use policies can allow parties important leeway to fashion arrangements that address all parties' needs as well as advance the public interest.

There is no question that fully functioning secondary markets can improve spectrum efficiency and maximize opportunities for everyone to put spectrum to its highest and most valued use. Nextel urges the Commission to use this proceeding to adopt rules and policies that permit flexible spectrum use arrangements, including lease agreements, for a broad range of wireless services. In particular, the Commission must overrule its traditional application of the *Intermountain Microwave* decision or conclude that the six factors enumerated therein no longer provide the proper boundaries of permissible commercial spectrum use relationships. This

action would be consistent with the Commission's goal of promoting the optimum use of limited and valuable spectrum resources and thus also consistent with the public interest and the directives of the Communications Act.

II. THE *INTERMOUNTAIN MICROWAVE* "CONTROL" CRITERIA SHOULD NO LONGER BE APPLIED TO PROHIBIT INNOVATIVE SPECTRUM MANAGEMENT STRUCTURES

The *Notice* recognizes that spectrum leasing arrangements by and large do not comport with the six *Intermountain Microwave* criteria traditionally used by the Commission to evaluate whether a Section 310(d) transfer of control has been triggered. Accordingly, the *Notice* seeks comment on whether the Commission should cease to apply the *Intermountain Microwave* principles and adopt a new set of criteria by which to evaluate *de facto* control of a licensee under lease arrangements.[3]

The *Intermountain Microwave de facto* control criteria plainly do not contemplate flexible spectrum use arrangements already in wide use outside of the CMRS services. *Intermountain Microwave* is simply outdated and the Commission quite correctly recognizes that continued adherence to its point-by-point control analysis will unnecessarily undermine the Commission's current spectrum flexibility initiatives. The Commission properly has recognized that "[a]s we consider the 'current realities' of spectrum leasing today, . . . we believe that it is no longer viable to analyze spectrum leasing arrangements through the lens of the *Intermountain Microwave* factors, even if we attempt to apply those factors 'flexibly.'"[4]

Moreover, in addition to the fact that the *Intermountain Microwave* factors do not "fit" with today's wireless marketplace, there simply is no legal rationale to retain outmoded and

[3] *Notice* at ¶¶ 74-76.

[4] *Notice* at ¶ 76.

outdated principles that the Commission applies on a case-by-case basis. *Intermountain Microwave* and its progeny are Commission decisions that developed out of a private microwave licensing case in the early 1960s. The precedent was subsequently applied to common carrier and commercial wireless providers. As such, the *Intermountain Microwave de facto* control criteria are not part of the Communications Act and can be expressly overruled or limited. Furthermore, the Court of Appeals for the District of Columbia Circuit has recognized that the Commission is free to overrule or limit its prior policy decisions, including its application of *Intermountain Microwave* to CMRS license transfers, by advancing a reasoned explanation for the change.[5]

Intermountain Microwave thus should not stand as a bar to any mutually agreed upon, lawful transaction between a licensee and another party and the Commission should expressly limit its application, in the context of spectrum lease agreements.[6] Such a result is consistent with the Commission's "efforts . . . to remove, relax or modify our rules and procedures to eliminate unnecessary inhibitions on the operation of secondary market processes and to promote flexibility and fungibility (exchangeable or substitutable) in the use of spectrum."[7]

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[5] *See Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 1327 (1994) (remanding a decision resting on the *Intermountain de facto* control criteria with instructions for the Commission to "bring its decision into compliance with agency precedent or explain its departure").

[6] In the Secondary Markets Forum, Dr. Robert Pepper, Chief of the Commission's Office of Plans and Policy, stated: "I would look at the band manager, 700 MHz Order [a]s our current thinking on [*Intermountain Microwave*]. We didn't purport to overrule *Intermountain*, but if you interpret *Intermountain* in light of what's explicitly permitted there, I think we tried to be quite clear as what we were permitting so that people will not have [an] *Intermountain* problem." *See* Secondary Markets Forum Transcript, May 31, 2000, at 123-124.

[7] Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, FCC 00-401, ¶ 19 (December 1, 2000) ("Policy Statement").

III. SPECTRUM LEASING OFFERS SIGNIFICANT POTENTIAL PUBLIC INTEREST GAINS AND IS CONSISTENT WITH THE COMMISSION'S SPECTRUM FLEXIBILITY GOALS

The *Notice* proposes to "clarify Commission policies and rules, and revise them where necessary, to establish that wireless licensees have the flexibility to lease all or portions of their assigned spectrum in a manner, and to the extent that, it is consistent with the public interest and the requirements of the Communications Act."[8] The *Notice* also concludes that leasing of spectrum rights will advance more efficient and innovative use of spectrum.

Permitting wireless licensees the flexibility freely to subdivide and apportion their spectrum and to lease their rights to use the spectrum to third-parties provides important new spectrum management options for licensees and prospective spectrum lessees. This approach is consistent with the public interest and the Commission's already established flexible use policies for certain mobile wireless services.[9]

Spectrum flexibility and efficient spectrum use have been overriding Commission goals in developing rules for new wireless services. In its licensing of the 700 MHz Guard Band spectrum, for example, the Commission "crossed the bridge" in not only authorizing but actively promoting leasing arrangements. Indeed, by structuring a "Guard Band Manager" licensee, whose sole function is to lease available Guard Band spectrum, the Commission created an

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[8] *Notice* at ¶ 14.

[9] *See, e.g.*, Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, FCC 00-403, ¶ 7 (November 20, 2000). There, for example, in defining its authority under the Balanced Budget Act, the Commission concluded that 800 MHz Business /Industrial Land Transportation ("B/ILT") licensees should be afforded flexibility in the use of

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innovative spectrum management tool that offers a new option for interested parties to more readily acquire spectrum for varied temporary, intermediate and/or long-term uses.[10] In developing this Guard Band Manager leasing framework, the Commission recognized that spectrum lease arrangements are "an important step" in providing spectrum users with more flexibility to acquire the amount of spectrum that best suits their communications needs. In particular, the Commission determined that:

> [T]he Guard Band Manager license will provide a mechanism for market-based transactions in wireless capacity at a time when wireline capacity is being freely traded as a commodity in the marketplace. . . . [I]mplementation of the Band Manager approach to licensing is potentially an important step in the direction of providing spectrum users with more flexibility to obtain access to the amount of spectrum, in terms of quantity, length of time, and geographic area, that best suits their needs. We believe that, consistent with our spectrum management obligations, enabling a "free market" in spectrum to develop could have significant public interest benefits in ensuring the limited spectrum resource is used efficiently, and the Guard Band Manager approach should help us advance that goal.[11]

In the *Notice,* the Commission proposes expanding upon its 700 MHz Band Manager initiative by adopting a spectrum leasing model for licenses in the Wireless Radio Services.[12]

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their licenses and allowed them to modify their licenses to permit commercial use, or to assign or transfer their licenses to CMRS operators for commercial use.

[10] Guard Band Managers were provided with flexibility to subdivide their spectrum in any manner and make spectrum available to any system operator or end user, private or commercial, for fixed or mobile communications, without having to secure prior Commission approval for any spectrum transfer, assignment or other arrangement subdividing the licensed spectrum.

[11] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299, ¶ 31 (2000) ("700 MHz Second Report and Order").

[12] "Wireless Radio Services" are defined in Section 1.907 of the Commission's rules, and include all radio services authorized in parts 13, 20, 22, 24, 26, 27, 74, 80, 87, 90, 95, 97, and 101 of Chapter 1 of Title 47 of the United States Code. These services include: Personal Communications Service ("PCS"); Cellular Radiotelephone Service ("Cellular"); Public Mobile

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The Commission needs to provide further flexibility without requiring or limiting the percentage of spectrum available for lease. In particular, the Commission proposes that non-broadcast wireless licensees holding "exclusive" authority to use particular spectrum within their licensed service area be permitted to lease all or portions of their licensed spectrum for use by non-licensees.[13] Importantly, the Commission also seeks comment on the potential for more flexible spectrum use arrangements in *shared* mobile service frequency allocations.[14]

Allowing "exclusive" spectrum licensees to lease all or part of such spectrum for this purpose will result in public benefits through more efficient spectrum use. There is no reason, however, to believe that spectrum leasing could not be extended to all mobile wireless licensees, across all license categories, including licensees of commercial, noncommercial, and public safety spectrum whether exclusively licensed or not. As a general principle, so long as the Commission has a coherent framework for assigning initial transmission rights and adequate rules to prevent and address interference, there should be no practical or technical impediment to allowing a broad application of the Commission's proposed flexible spectrum use policy, such as spectrum leasing, across shared as well as exclusively assigned spectrum.[15] Indeed, spectrum

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Services other than cellular (*i.e.*, Paging and Radiotelephone, Rural Radiotelephone, Offshore Radiotelephone, Air-Ground Radiotelephone); SMR; Wireless Communications Service ("WCS"); Local Multipoint Distribution Service ("LMDS"); Fixed Microwave Service; 700 MHz Service; 700 MHz Guard Band Service; 39 GHz Service; 24 GHz Service; 3650-3700 MHz Service; 218-219 MHz Service; and Private Land Mobile Radio Services ("PLMR").

[13] *Notice* at ¶ 25. While the *Notice* does not directly address this point, a flexible spectrum use policy should not bar licensees from becoming lessees. For example, a licensee at 1.9 GHz should not be prevented from becoming a lessee at 800 MHz.

[14] *Notice* at ¶ 65.

[15] Policy Statement at ¶ 20. No technical impediments exist that prevent shared spectrum from being leased. Under the Commission's General Category spectrum channels, which were authorized for conventional or trunked use to all categories of eligible users in the 800 MHz band

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leasing affords significant flexibility for all licensees that have unused spectrum resources to offer that spectrum to those who could place it into productive use.

In the case of public safety spectrum, for example, licensees could gain important flexibility to lease underused spectrum on a limited basis to commercial users without permanently giving up that portion of their spectrum or having it remain unused. Such arrangements could have provisions for public safety override of the commercially leased spectrum in emergencies, thereby making more efficient use of the spectrum during non-emergency periods. Public safety licensees that choose to lease spectrum would generate revenue from such arrangements, while safeguarding their ability to access and use this spectrum for their own purposes in the future and during emergencies.[16] Lease contracts in such situations could be narrowly tailored to limit the use of the spectrum to suit the public safety licensees' needs.

Furthermore, while management agreements and assignments serve the purpose for some carriers' business plans, there are many situations, like the public safety scenario, where licensees do not want to sell their spectrum licenses. Indeed, certain carriers may have excess capacity, or, as in the case of public safety licensees, hold spectrum in reserve –spectrum they value highly but are unable to put to current use. Today, with the plethora of commercial

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and subject to frequency coordination, for instance, licensees can lease their shared spectrum under the same frequency coordination and use restrictions applicable to its license. To the extent that shared spectrum licensees can accommodate other users on their spectrum through lease-type arrangements, they should be permitted to do so.

[16] This represents a perfect example of how parties in the secondary market could develop commercial leasing terms that reflect their spectrum use needs, much as utility providers, for example, offer discounted terms to users willing to accept service interruptions during peak demand periods.

competitive options – as opposed to the limited cellular duopoly of the past – such licensees, rather than assign the spectrum or leave it unused, could, for example, partner with commercial providers or contribute their spectrum to virtual private network solutions that are able to "roam" onto a commercial system.[17] The Commission should take the opportunity now to eliminate the spectrum inefficiencies that exist in today's wireless marketplace by allowing *all* spectrum licensees to enter commercially reasonable spectrum leasing arrangements.

As discussed in the next section, the Commission has broad discretion under the Communications Act to permit spectrum lease arrangements across all mobile wireless markets. Where the "rules of the road" are plain, there is no reason not to permit leasing, swaps and other types of flexible use arrangements for shared as well as exclusive use spectrum. The public interest supports maximizing spectrum flexibility across all classes of mobile wireless licensees.

IV. THE COMMISSION HAS BROAD LEGAL DISCRETION TO DEFINE THE SCOPE OF SPECTRUM LEASING ARRANGEMENTS AND TO PROMOTE SECONDARY MARKETS

Putting aside the obvious public interest benefits of establishing a more uniform flexible spectrum use policy, there is no question that the Commission has full legal authority to institute policies that promote the growth of secondary spectrum markets, including the encouragement of leasing agreements, joint ventures, partnerships and other similar arrangements. Section 309 of the Communications Act provides the Commission with significant leeway in implementing its

[17] It is more than conceivable that some private spectrum licensees would be willing to allow commercial use of their excess capacity or share their channel capacity. Some may even wish to enter into joint ventures with commercial providers for the use of the excess capacity, provided that the licensee retains its licenses and can ultimately reclaim those licenses should the venture fail. The Wireless Telecommunications Bureau in fact received a request for declaratory ruling last year seeking confirmation that a joint venture arrangement of this sort was permissible. *See* Letter to Thomas J. Sugrue, Chief of the Wireless Telecommunications Bureau, from Golden West Telecommunications Cooperative, Inc., *et al.*, dated June 30, 2000.

spectrum management policies. Section 309 specifically provides the Commission with broad authority to grant or deny license applications based on the sole criteria of whether the public interest would be served.[18] In addition, Section 309 supplies the Commission with the authority to prescribe the rules and regulations necessary for licenses subject to competitive bidding.[19]

Moreover, Section 310 of the Communications Act provides the Commission with the discretion to determine what circumstances may constitute a transfer of control of a license requiring prior Commission approval.[20] Pursuant to Section 310(d), the Commission has the discretion to determine whether a *de facto* transfer of control has occurred, and if so, whether the public interest will be served by the proposed transfer. Nothing in Section 310(d) requires that spectrum leasing arrangements be treated as a transfer of control or license assignment requiring prior Commission approval.

The Commission already has recognized its ability to define and redefine the parameters of its authority under the Communications Act to require parties to seek prior approval for acts the Commission deems to be transfers of control.[21] In the most recent case of 700 MHz Guard Band licensing, for example, the Commission found that the creation of licensees whose sole function is to lease their licensed spectrum to third-parties for their own use or for providing commercial services is consistent with the Commission's broad licensing authority conferred in

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[18] 47 U.S.C. § 309(a).

[19] 47 U.S.C. § 309(j).

[20] 47 U.S.C. § 310(d).

[21] *See, e.g.*, Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services,

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Sections 301, 303 and 309 of the Communications Act.[22] In addition, the Commission found that "spectrum leases" are permitted in other Commission-sanctioned commercial licensed services, including Instructional Television Fixed Service ("ITFS") licensee leases of excess capacity to Multipoint Distribution Service ("MDS") licensees and broadcaster leasing of excess digital television ("DTV") capacity for non-broadcast purposes. In particular, the Commission found that: "In neither of the cited instances did we find it inconsistent with our statutory licensing responsibilities to allow licensees to contract for the use of their licensed frequencies by non-licensees."[23] Notably, the Commission has permitted lease-type arrangements in certain other contexts. Indeed, for more than twenty years the Commission has approved the use of long-term arrangements to access the capacity of U.S.-licensed satellite facilities.[24] The Commission has approved such arrangements because licensees and their customers require stable relationships, and such arrangements serve important public interest purposes, including risk sharing, assured access to capacity and more certain system planning.[25]

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Memorandum Opinion and Order, 13 FCC Rcd. 6293, 6303, ¶ 16 (1998) (adopting policy change to allow post-hoc notifications of *pro forma* transfers and assignments).

[22] Sections 301 and 303 of the Communications Act provide the Commission with general authority over radio spectrum licenses. *See* 47 U.S.C. §§ 301, 303.

[23] 700 MHz Second Report and Order at ¶ 43.

[24] *See* Application of Satellite Business Systems for Modification of Domestic Fixed-Satellite Space Station Authorization to Permit Non-common Carrier Transponder Transactions, *Memorandum Opinion, Order and Authorization,* 95 FCC 2d 866 (1983) ("Satellite Transponder Order"); *see also* Domestic Fixed-Satellite Transponder Sales, *Memorandum Opinion, Order and Authorization*, 90 FCC 2d 1238 (1982).

[25] *See generally* Satellite Transponder Order. *See also* Application of Satellite Business Systems; For Modification of Domestic Fixed-Satellite Space Station Authorization to Permit Noncommon Carrier Transponder Transactions, Memorandum Opinion and Order and Authorization, 95 FCC 2d 866, ¶ 11 (November 2, 1983) (noting that "[i]n our *Transponder Sales Order*, we authorized several licensees to offer transponder facilities on a noncommon

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In adopting this liberalized approach for the 700 MHz Guard Band, the Commission determined that the Band Manager concept "is consistent with the requirement in Section 310(d) of the Communications Act that licensees retain ultimate *de facto* control of their licenses." The Commission reasoned that Guard Band Managers will "have full authority and the duty to take whatever actions are necessary to ensure third-party compliance with the Act and [the Commission's] rules."[26] The Commission should extend these same principles to other mobile wireless licensees, including licensees that provide for shared use.

Thus, so long as a licensee retains responsibility for ensuring compliance with Commission rules, flexible use arrangements are consistent with the requirements of the Communications Act.[27] Furthermore, the Commission can, as it did in the Guard Band proceeding, explicitly retain authority over licensees who are overseeing a third-party spectrum operator, under a variety of enforcement sections of the Act.[28] For all these reasons, the Commission should permit wireless licensees to reach mutually beneficial spectrum arrangements that enhance spectrum use. This would be consistent with the Commission's goal of establishing a framework to facilitate the development of active secondary markets in spectrum usage rights and further the efficient and intensive use of the electromagnetic spectrum

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carrier basis. An important aspect of that order was the demonstrated need and desire of both the licensee and its customer to enter into a long-term, stable relationship. We found that such transactions served the public interest, were consistent with our regulatory policies, and were noncommon carrier in nature.").

[26] 700 MHz Second Report and Order, at ¶ 46.

[27] While under a spectrum leasing regime, the Commission may need to re-evaluate the need for rules related to service or user eligibility, system build-out or technical or service restrictions; this development is merely the next logical step in freeing spectrum markets to emulate as much as possible, free markets.

[28] 700 MHz Second Report and Order, at ¶ 47.

and the development and rapid deployment of new technologies, products, and services for the benefit of the public.[29]

V. IMPLEMENTATION ISSUES

The *Notice* raises several questions about how spectrum leasing should be implemented. In addition to the issue of responsibility for rule compliance, the Commission requests comment on service eligibility, spectrum attribution and technical matters.

A. The Licensee Should Be Responsible for Compliance With the Requirements of its License

The *Notice* requests comment on different ways to ensure compliance with the Commission rules under the terms of spectrum lease agreements. In particular, the Commission proposes that the licensee retain the ultimate responsibility for ensuring that the spectrum lessee complies with the Communications Act and the Commission's rules. As such, the Commission seeks input on what actions it should take to ensure that the licensee meets this responsibility.[30]

Nextel agrees that the ultimate responsibility for compliance with the Commission's rules should remain with the licensee. As a general matter, a spectrum lessee should have no greater operating rights than the licensee and should have to operate within the technical parameters of the license. Nextel also believes that the use of written contracts that include specific obligations of cooperation and compliance by spectrum lessees would be useful to all parties in dealing with any enforcement or compliance issue. A written contract establishes that the lessee has knowledge of its obligations to comply with Commission or licensee instructions and specifies how disputes between lessors and lessees are to be resolved.

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[29] Policy Statement at ¶ 40.

[30] *Notice* at ¶¶ 27-28.

Use of written contracts for secondary market transactions is consistent with the approach taken in the Guard Band Manager proceeding. There, the Commission specified that contracts between the Guard Band Manager and the lessee "must include provisions that apply all existing licensee obligations to the spectrum user."[31] Spectrum users were thus required to comply with all applicable Commission rules, and were put on notice of such requirement.[32] A similar approach can be implemented here.

Importantly, while parties in a secondary market transaction understand that the Commission has the ability later to change rules in ways that may adversely affect negotiated business arrangements, the Commission must be aware of its responsibility to not lightly upset settled expectations once secondary markets begin to function under the new regime. Relative certainty is critical to business planning and the emergence of a vibrant secondary market. The Commission should not cede the field to commercial arrangements only to later disrupt the climate it created for flexible use.

B. Service -Specific Eligibility Requirements Should Not Inhibit Spectrum Leasing Arrangements

The *Notice* proposes to apply the same eligibility restrictions applicable to a licensee of a particular service to the lessee of that license.[33] Under this approach, licensees would be responsible for ensuring that the same rules that restrict their eligibility to hold a licenses would similarly restrict the eligibility of entities seeking to enter leasing arrangements.

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[31] 700 MHz Second Report and Order, at ¶ 50.

[32] Nextel agrees with the Commission's tentative conclusion to disclaim responsibility for enforcing or resolving purely contractual disputes that arise under secondary market contracts. *See Notice* at ¶ 34.

[33] *Notice* at ¶ 44.

Service-specific eligibility requirements will thwart the Commission's current initiative. By drastically restricting the class of users that can lease underused or unused spectrum resources, the Commission could well defeat its purpose of allowing wireless carriers to enter leasing and other flexible arrangements to put that spectrum to its highest and most valuable use. Rather than imposing eligibility restrictions, the Commission should be taking steps to allow commercial licensees to lease spectrum to non-commercial licensees as well as the inverse.

The *Notice* also asks how the Commission should treat for attribution and spectrum aggregation purposes spectrum that is committed under a lease. Any questions related to spectrum cap attribution and aggregation of spectrum leases should be addressed and resolved in the recently initiated spectrum cap rulemaking.[34] Should the Commission determine, however, that a spectrum attribution and aggregation rule[35] should be applied to lease arrangements, it is critical that the Commission ensure that the spectrum is not attributed to both the licensee and the lessee, *i.e.*, "double" attribution for the same spectrum. Double attribution of spectrum would greatly reduce licensees' incentives and opportunities to acquire additional spectrum under the spectrum cap and decrease the efficiencies otherwise possible via spectrum leasing. More fundamentally, any attribution rules or policies adopted by the Commission that apply to leases or management arrangements must be bright line standards and uniformly applied.[36]

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[34] *See* 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, WT Docket 01-14, FCC 01-28 (rel. January 23, 2001).

[35] *See* 47 C.F.R. § 20.6 ("No licensee in the broadband PCS, cellular, or SMR services . . . regulated as CMRS . . . shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs). . . .").

[36] An exception to uniformity in permitting lease arrangements should be any special benefit programs that the Commission maintains for particular entities, such as entrepreneurs. Spectrum leases should not be used as a way for entities that received licenses under the entrepreneur/small

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C. The Commission Should Remove Technical Rule Barriers to Spectrum Leasing

The *Notice* solicits comment about ways to modify technical rules to encourage spectrum leasing. While there may be a number of necessary rule changes, Nextel believes that at the outset Commission should clarify that its construction benchmarks and any system "deconstruction" rules should not operate to penalize a licensee that leases spectrum. For example, in various wireless service categories, the Commission has imposed specific coverage and construction requirements to "deter speculation" and "promote rapid deployment of new technologies and services and promote service to rural areas."[37] In the case of spectrum leasing, there is no rationale to require that the licensee continue to build out its system and comply with the coverage requirements, while the lessee constructs and serves the same service area. A "double construction" requirement does not further the Commission's goal of rapid deployment and service to the public, it merely hinders the licensee from effectively serving its other coverage areas and prevents the lessee from adequately deploying its own network. Failure to address the "deconstruction" issue may stymie otherwise perfectly acceptable leasing arrangements where a lessee prefers to build and operate its own infrastructure.

VI. CONCLUSION

Everything the Commission can do it should do to encourage the effective functioning of a secondary market for radio spectrum. One important step would be to abandon the outdated

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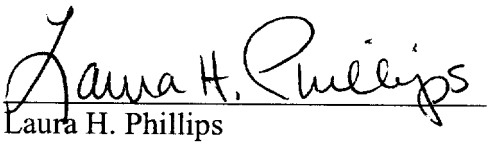
business rules to disengage from their responsibilities under the program to be substantially involved in the running of the licensed enterprise. The Commission should have special rules for leasing by these entities, so that its plan for entrepreneurial involvement not be subverted.

[37] *See, e.g.*, Amendment of the Commission's Rules Regarding Multiple Address Systems, *Notice of Proposed Rulemaking*, 12 FCC Rcd 7973, ¶ 38 (1997).

Intermountain Microwave criteria for evaluating whether spectrum lease and other new arrangements might trigger unauthorized transfers of control. *Intermountain Microwave* plainly inhibits the formation of privately and publicly beneficial inter-carrier relationships and prevents more efficient spectrum use. In addition to eliminating obsolete policies, the Commission should expand its secondary markets proposal to permit all mobile wireless carriers to enter into spectrum lease arrangements. Such flexible spectrum use arrangements will increase competition, promote spectrum efficiency and thus advance the public interest.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.



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February 9, 2001

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Dow, Lohnes & Albertson, do hereby certify that on this 9th day of February, 2001, copies of the foregoing "Comments of Nextel Communications, Inc." were sent via hand delivery to the following:

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